84-121

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Admendment requires that disbarment of an attorney be grounded upon a standard of proof insuring greater factual certainty than that yielded by a "preponderance of the evidence."

2. Whether the Indiana Supreme Court violated due process when it applied a procedural rule, governing an attorney's access to that court's review of a hearing officer's findings of fact, in such a way as to ignore: (1) the fact that the rule itself contained internal inconsistencies resulting in vagueness; and (2) the fact that the court's previous interpretation of the rule provided no warning of the ruling it ultimately made, when it was too late for petitioner to conform.

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PETITION FOR A WRIT OF CERTIORARI
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Attorney-petitioner, ZARKO SEKEREZ ("petitioner"), respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered January 18, 1984, by which that court disbarred petitioner from practicing law in the State of Indiana.

OPINION BELOW

A hearing officer appointed by the Indiana Supreme Court heard evidence as to a seven-count Complaint for Disciplinary Action and filed a Report, finding against petitioner on all seven counts and deeming him to be in violation of eleven provisions of the Indiana Disciplinary Rules. (Appendix B) The Indiana Supreme Court dismissed two of the counts but, finding against petitioner under the remaining five, disbarred him from the practice of law in Indiana. (Appendix A, ____ Ind. _____, 458 N.E.2d 229 (1984)).*

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*The Indiana Supreme Court's order, entitled "Disciplinary Action," will be referred to herein as the "Disbarment Order."

JURISDICTION

The Disbarment Order of the Indiana Supreme Court was entered January 18, 1984. A timely-filed Petition for Rehearing was denied on April 23, 1984. This Petition for Writ of Certiorari was filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES:

Section 1.

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE RULE INVOLVED

Indiana Rule For Admission and Discipline of Attorneys 23, Section 15(c) (in pertinent part):

> In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review....

STATEMENT OF THE CASE

Introduction

Petitioner was disbarred in Indiana on the basis of facts established by a mere preponderance of the evidence--a standard that petitioner contends is constitutionally insufficient to support

the serious economic loss as well as damage to reputation inflicted by disbarment. The application of this inadequate standard of proof was the result of the Indiana Supreme Court's harsh and unpredictable interpretation of a procedural rule. This interpretation itself violated due process because it did not give petitioner sufficiently clear notice of how he could avoid being held to have waived his right to have the Indiana Supreme Court exercise its function as the "ultimate fact finder"* in an attorney disciplinary action in which it "sits as a trial court and must determine issues of fact."**

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*Matter of Moore, 453 N.E.2d 971, 973 (Ind. 1983).

**Matter of Murray, 266 Ind. 221, 362 N.E.2d 128, 130 (1977).

Lack of an Independent State Ground for the Indiana Supreme Court's Disbarment of Petitioner.

In its Disbarment Order, the Indiana Supreme Court stated:

> Having determined that the Respondent has engaged in misconduct we must evaluate the appropriate sanction. Taken individually, the violations may not appear to be of a magnitude which would indicate a severe sanction. However, when examined as a whole, the numerous violations suggest that Respondent's entire system of clinics was operated in an unprofessional manner... (Disbarment Order, p. 27, Appendix A.)

Thus, by the Court's own admission, the disbarment rests not upon any single finding of misconduct or even upon several such findings but, rather, upon all the findings of a hearing officer--adopted without review--which supported the five counts the Indiana Supreme Court retained. The weight of the evidence, the standard of proof, and

petitioner's right to the court's review are therefore inescapable issues.*

Background

Petitioner had been practicing as a traditional law firm in Indiana since 1965 when, as a result of this Court's

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*Count VI concerned petitioner's use and advertisement of what the court concluded were trade names prohibited by the Indiana Code of Professional Responsibility for Attorneys at Law. Since the evidence supporting this count was purely documentary, this count can be said to involve no issues of fact. However, all the remaining counts contributing to petitioner's disbarment were based upon factual testimony and required not only that determinations be made as to what actually happened but also that such determinations be weighed against the frequently general wording of the disciplinary rule in question. (E.g., "Conduct...prejudicial to the administration of justice;" "Conduct that adversely reflects on...fitness to practice law;" "...reasonable steps to avoid forseeable prejudice to the rights of his client, including giving due notice...;" "Intentional failure to seek the lawful objectives of his client through reasonably available means...")

decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), he opened branch offices--or "legal clinics"--in a number of cities within the state. Petitioner hoped that by concentration on routine legal services and by efficient use of staff supervised by a licensed attorney in each office, he could provide services at modest rates.

Attorneys in petitioner's clinic handled a high volume of legal matters, and gave large numbers of initial free consultations, frequently advising that the services of a lawyer were not needed and instructing on pro se procedures. Petitioner's clinics received referrals from a roster of diverse sources.*

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*E.g., the Better Business Bureau, credit and labor unions, courts, hospitals, Valparaiso University.

However, in August, 1980, the Disciplinary Commission of the Supreme Court of Indiana ("Commission") filed a seven-count complaint against Mr. Sekerez. Five counts were based on grievances of individuals; two were based on misconduct alleged by the Commission itself.

After a five-day evidentiary hearing in August, 1981, involving a number of witnesses produced by both petitioner and the Commission, the hearing officer adopted--verbatim--the findings and conclusions submitted by the Commission for each of the seven counts.

In July, 1982, petitioner petitioned the Indiana Supreme Court for a review of the hearing officer's Report. Petitioner challenged certain of the findings of fact and asserted the constitutional

inadequacy of the preponderance of the evidence standard under which the hearing officer had made his findings.*

STATEMENT OF THE CASE PERTAINING TO ARGUMENT I

In its order of January 18, 1984, the Indiana Supreme Court perfunctorily dismissed petitioner's due process objection to the preponderance of the evidence standard and, in spite of its declared intent to review the evidence under the "clear and convincing" standard, recently declared by that same court to be appropriate in disbarment proceedings, ultimately refused to review any of the hearing officer's factual determinations.

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*As provided by Indiana Admission and Discipline Rule 23, Sec. 14(f).

The Court dismissed two of the counts, but disbarred petitioner on the basis of the cumulative effect of the surviving five counts. In so doing, the Court deprived petitioner of the license to practice his profession on the basis of the minimum standard of factual reliability. (Disbarment Order, Appendix A.)

Petitioner's Raising in the Indiana Supreme Court of His Fourteenth Amendment Due Process Claim that a Mere Preponderance of the Evidence is a Standard of Proof Insufficient to Support Disbarment.

In his Brief of Respondent, filed July 19, 1982, petitioner argued that:

> Admission and Discipline Rule 23, Section 14(f), which provides for the standard of proof to be used in disciplinary proceedings, is in violation of the due process Clause of the Fourteenth Amendment to the United States Constitution, in that it allows the imposition of disciplinary sanctions upon attorneys without a showing of clear and

convincing proof. (Brief of Respondent, p. 9)

Subsequently, in his Reply Brief, petitioner stated:

> ...[T]he standard of proof issue is important. Disciplinary proceedings may have a profound impact upon the respondent-attorney, both in terms of his reputation and his ability to continue to practice in his chosen profession. Although it is a privilege to be allowed by the State of Indiana to practice law, once this privilege is granted, the attorney acquires a property right, which can only constitutionally be altered by due process of law. Given the interests of the respondent-attorney at stake, and the quasi-criminal nature of disciplinary proceedings, the higher standard of proof of "clear and convincing evidence" is constitutionally required.
>
> The United States Supreme Court has held that the "clear and convincing" standard should be adhered to in quasi-criminal cases, which "are significantly different from the ordinary economic case: where significant individual rights are not at stake." In re Winship, (1970) 397 U.S. 358, 371...[Citations to Indiana civil cases applying the clear and convincing standard of proof omitted.] The logic and

> rationale of the above-cited cases leads to the conclusion that clear and convincing proof should be required in attorney disciplinary proceedings...(Reply Brief of Respondent, filed February 18, 1983, pp. 54-55).

Choosing to ignore the expanded due process argument in his Reply Brief, the Indiana Supreme Court stated that petitioner made no attempt to substantiate his due process claim regarding the standard of proof. Nevertheless, the court, citing its own recent case, Matter of Moore, 453 N.E.2d 971 (1983), stated:

> [T]he 'clear and convincing' standard of proof more reasonably conforms to our analysis of the nature of the disciplinary process and follows the weight of authority. Accordingly, we will review the evidence in this case under a 'clear and convincing' standard. (Disbarment Order, p. 7, Appendix A.)

However, the Court ultimately denied such a review by adopting and accepting

as its own the findings of fact submitted by the hearing officer, findings made under a mere preponderance of evidence standard. (Ibid.)

In his Brief In Support Of Petition For Rehearing, petitioner again argued the inadequacy of the hearing officer's standard of proof:

> In light of this Court's recent decision in In re Moore, (1983) 453 N.E.2d 971, wherein the Court held the "clear and convincing" standard of proof applicable to disciplinary actions, the challenged findings of the hearing officer in this cause must be critically examined, since he made his findings and conclusions using the "preponderance of evidence" standard of proof...(Brief in Support of Respondent's Petition For Rehearing, p. 11.)

The Indiana Supreme Court summarily denied petitioner's Petition For Rehearing. (Order, April 23, 1984, Appendix D.)

STATEMENT OF THE CASE PERTAINING TO ARGUMENT II

In addition to arguing the insufficiency of the standard of proof supporting the hearing officer's factfindings, petitioner challenged a number of specific findings.* He did so pursuant to the directive of Admission and Discipline Rule 23, Section 15(c) which states in pertinent part:

> In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review.

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*See Appendix F.

After requesting an extension of time from the Court in order to submit even a limited record with his Petition for Review, on July 19, 1982, petitioner provided a partial record consisting of his own testimony (both on direct and cross examination), testimony of employees and of attorneys familiar with him, and various documents, including a letter from a client supporting petitioner's claim in regard to an important factual issue of Count V.*

Subsequent to petitioner's submission of the evidence, the Commission

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*Mrs. Hatcher's letter acknowledged that well before he accepted the case, petitioner had indeed talked to Mr. Hatcher about the auto accident in question. The letter thus seriously challenges the hearing officer's finding that petitioner had not provided the initial free consultation which he advertised.

petitioned the court to require petitioner to supplement the record submitted under Rule 23, Section 15(c). By Order of October 25, 1982, the court ruled that:

> that portion of the (Commission's) petition seeking to require the supplementation of the record should not be granted in that the findings of the hearing officer are a sufficent basis for the implementation of discipline and that it is incumbent on the petitioning party to present a sufficient record to countermand the significance of the hearing officer's findings. If the record submitted is insufficient, the petitioning party must stand on it... (Order, October 26, 1982; Appendix C.)

With his Reply Brief, filed February 18, 1983, petitioner included the transcript of testimony, on direct examination by the Commission of his client, Susan McCoy, who filed the grievance set forth in Count III. This testimony brought into question an

important factual finding* and, when combined with documents also submitted at this time, cast serious doubt on the client's veracity as a foundation for the misconduct of Count III as a whole.**

In its Disbarment Order, the Indiana Supreme Court stated that petitioner "filed only a transcript of the testimony of his witnesses," an assertion that not only overlooks the McCoy testimony but

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*The finding being that petitioner had not provided the free initial consultation advertised.

**A check drawn by Mrs. McCoy and verified by the drawee bank proved that she had made contact with petitioner's office almost two months before she said she had on direct examination. Her lack of reliability is relevant not only to the free consultation issue but casts serious doubt on her allegation that petitioner had advised her to promise to pay her husband's attorney's fees but then return to California and never pay them.

that seems to imply that all the evidence petitioner submitted in his factual challenges was either produced by him or by persons in his camp, an implication belied by the McCoy and Hatcher documents as well as others. However, using this pronouncement as its justification, the Court, quoting only from the first sentence of Rule 23, Section 15(c), stated:

> ... Admission and Discipline Rule 23,Section 15, defines the procedure for review by this Court of our Hearing Officer's findings. This provision authorizes a petition for review and requires a party who challenges the factual findings to submit with his petition a record of all of the evidence relating to the challenged factual issue (our emphasis). Upon examination of the pleadings filed by Respondent, it appears to this Court that the Respondent has chosen not to follow this procedure...
>
> ...

> This Court finds that a transcript containing only one party's case in chief does not constitute all of the evidence as required under the above noted rule.
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> ...
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> ... As previously held, the transcript submitted by the Respondent did not comply with our rule. Therefore, in that the Respondent has not provided the requisite record to assert error and in that the Disciplinary Commission has not submitted any record, this Court now adopts and accepts as its own the findings of fact submitted by the hearing officer and will only review the conclusions thereunder and the Respondent's constitutional challenges.
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> (Disbarment Order, pp. 1, 3, 5, Appendix A.)

Thus, the court foreclosed review of the challenged findings, as well as of the findings as a whole, on the basis of a mis-characterization of the evidence petitioner submitted in support of his challenges and a consequently harsh and surprising interpretation of Rule 23,

Section 15(c), which overlooked the ambiguities created by the second sentence of the Rule and the more liberal interpretation contained in its own Order of October 26, 1982. It is noteworthy that regarding the severity of its sanctions, the Court stated:

> Having determined that the Respondent has engaged in misconduct we must evaluate the appropriate sanction. Taken individually, the violations may not appear to be of a magnitude which would indicate a severe sanction. However, when examined as a whole, the numerous violations suggest that Respondent's entire system of clinics was operated in an unprofessional manner. ...(Disbarment Order, p. 27, Appendix A).

It is no more possible to guess what resolution the Court would have made of those facts challenged under Rule 23, Section 15(c), than it is to speculate what the hearing officer's findings might

have been under a proper standard of proof.

Petitioner's Timely Raising Of His Claim That The Court's Harsh And Unpredictable Application of Admission and Discipline Rule 23, Section 15(c) Violated Due Process.

Petitioner first raised his due process objection to the Indiana Supreme Court's refusal to consider his challenges in his Brief in Support Of Respondent's Petition For Rehearing, in which he asserted, pp. 8-9:

> ...The rules do not require that the entire record be submitted, unless all findings are challenged. Fundamental fairness therefore dictates that Respondent's evidence be considered and reviewed. The Commission should not be rewarded for its inaction, and neither should Respondent be penalized therefor.

Petitioner's objection to the Court's refusal to review the challenged facts was timely because, the Court's application of Rule 23 was unexpected and

unpredictable:

A. The first sentence of Rule 23, Section 15(c), does state that a party asserting error in a hearing officer's factfinding:

> shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue.

However, the next sentence of the Rule belies its literal meaning:

> Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review.

Clearly, the second sentence makes it plain that a petitioner is to supply what he believes to be all the necessary evidence and that there is a resultant burden upon the defender of the challeged finding to file any additional evidence he deems essential to resolution of the

dispute.

B. The Indiana Supreme Court's Order of October 25, 1982, added to the unpredictability of the Court's applying the Rule as it eventually did when, instead of saying it is the duty of the party petitioning for review of the hearing officer's findings to submit all possible evidence regarding those findings, it stated:

> ...it is incumbent on the petitioning party to present a sufficient record to countermand the significance of the hearing officer's findings... (Emphasis added; see Appendix C.)

The Court's interpretation of its rule was not lost upon petitioner:

> ...Although opposing counsel has criticized the limited Record submitted to this Court by Respondent, Respondent has, in the words of this Court's ruling, on October 25, 1982, presented "a sufficent record to countermand the significance of the Hearing Officer's findings" in which he cannot acquiesce. (Reply Brief, pp. 1, 2.)

Nevertheless, petitioner included more evidentiary material with his Reply Brief. (See Statement of the Case, supra.) The Commission submitted nothing in support of the findings.

Having thus invited reliance upon a sensible interpretation of a rule that itself contains internal conflicts, the Indiana Supreme Court proceeded unpredictably to foreclose petitioner from making any factual challenges whatsoever. In doing so, the court ignored both the Rule's ambiguity and the import of its own previous Order on the subject. (See Disbarment Order, pp. 2-3, 7, Appendix A.)

On February 27, 1984, petitioner filed with the court a Motion For Leave To Supplement Record, stating that he had "in good faith attempted to comply with

all applicable rules and present this Court with what [he] believed to be an adequate record of evidence relating to the challenged findings..." This Motion was denied, along with his Petition for Rehearing. (Order, April 23, 1984, Appendix D.)

The instant case falls into the class of decisions in which this Court reviews a State Supreme Court's unpredictable foreclosure either of a party's opportunity to litigate a substantive federal issue (see, Missouri v. Gehner, 281 U.S. 313 (1930), in which an unpredictable construction of a state tax statute resulted in the taxation of U.S. Government bonds without the holder's chance to invoke federal protection against such taxation), or of a party's general due process right to be heard

regarding the matter at issue (see, Saunders v. Shaw, 244 U.S. 317 (1917), in which the Missouri Supreme Court's unanticipated ruling resulted in the admission of evidence which had been excluded at trial and which therefore had not been rebutted by the opposing party; and Brinkerhoff - Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930), in which the overruling of a clear precedent upon which the trust company relied left the company without any means of challenging a tax levy).

Petitioner's assertion of his federal claim regarding the application of Rule 23 in his Petition for Rehearing was timely, since "it was raised at the first opportunity." Brinkerhoff-Faris, supra, 281 U.S. at 678. The Indiana Supreme Court's unforeseeable application of its

rule brings this case within this protective principle as amplified in Missouri v. Gehner, supra, 281 U.S. at 320:

> It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the State court for rehearing where the petition is denied without more. ...But here the company at the first opportunity invoked the protection of the federal Constitution and statute. It could not earlier have assailed the [State statute] as violative of the Constitution and laws of the United States... It may not reasonably be held that the company was bound to anticipate [the Missouri Supreme Court's] construction or in advance to invoke federal protection... 281 U.S. at 320. (Citations omitted.)

And, in Saunders v. Shaw, supra, 244 U.S. at 320, Justice Holmes wrote:

> ...But when the act complained of is the act of the [State] Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add

> to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance...

The Indiana Supreme Court's October, 1982, Order actually reconciled the first two sentences of Rule 23, Section 15(c). Therefore, the Court's reinterpretation of the rule in its Disbarment Decision constitutes not only an abrupt change of stance but also makes the rule's second sentence meaningless. The twelfth-hour foreclosure of review at the same time defines petitioner's raising of the issue as procedurally timely and frames the substantive due process deprivation.

ARGUMENT

I.

"PREPONDERANCE OF THE EVIDENCE" IS A CONSTITUTIONALLY INSUFFICIENT STANDARD UPON WHICH TO BASE FACTUAL FINDINGS SUPPORTING THE DISBARMENT OF AN ATTORNEY.

The gravity of the interests derived from a law license has been recognized by this Court in several contexts.

Even before admission to the bar, a potential attorney's interests are considerable. Preparatory to ruling on the constitutionality of the California Supreme Court's denial of a law license, Justice Black stated, in Konigsberg v. State Bar of California, 353 U.S. 252, 257-58 (1957):

> While this is not a criminal case, its consequences for Konigsberg take it out of the ordinary run of civil cases. The Committee's action prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

Certainly, upon earning the privilege to practice law, "an attorney's calling or profession is his property, within the true sense and meaning of the Constitution." Ex Parte Wall, 107 U.S. 265, 289 (1883). And disbarment, the deprivation of a lawyer's license," is a punishment or penalty imposed on the lawyer" by way of "adversary proceedings of a quasi-criminal nature." In re Ruffalo, 390 U.S. 544, 550, 551 (1968). Thus, it is clear that the label "civil" does not necessarily obviate the need for stricter safeguards than those that pertain to the trial of purely civil matters. In re Winship, 397 U.S. 358, 365-66 (1970). The characterizations in Konigsberg and Ruffalo of an attorney's interest in his license, and of the nature of the proceedings depriving him

of it, suggest that standards more exacting than those governing ordinary civil cases must be applied to disbarment hearings. Spevack v. Klein, 385 U.S. 511 (1967), in its discussion and treatment of disbarment as a penalty, implies that an attorney facing disbarment proceedings must be afforded considerable protection, including a higher standard of proof than that required in the ordinary civil case.

In reversing New York's disbarment of an attorney because of his refusal both to produce records pursuant to a subpoena duces tecum and to testify at a judicial proceeding, the Spevack majority, speaking through Justice Douglas, stated:

> "The Fourteenth Amendment secures against state invasion... the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty... for such

> silence." [Quoting from Malloy v. Hogan] 378 U.S., at 8...
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> In this context "penalty" is not restricted to fine or imprisonment. It means... the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."...
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> ...
>
> The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him..."...

385 U.S. at 514-16.

The acknowledged drastic effects of disbarment, and the recognition that it is more than a merely civil matter, call for a due process requirement that the factual foundation for disbarment be laid upon a more firm underpinning than that provided by proof by a mere preponderance

of the evidence.

This Court appears to have established two approaches to ascertaining minimum permissible due process which are helpful in considering the problem at hand--one general, and one specifically concerning minimum standards of proof. Petitioner contends that under either approach, a preponderance of evidence is constitutionally deficient in disbarment proceedings.

1. Identifying The Dictates Of Due Process By Consideration Of Three Distinct Factors.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the issue was the constitutionality of terminating Social Security disability benefits before the recipient was afforded an evidentiary hearing. Writing for the majority, Justice Powell first stated the broad

principle that: "Due Process is flexible and calls for such procedural protections as a particular situation demands." He then elaborated this principle by saying: "[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficent requires analysis of the governmental and private interests that are affected." Justice Powell finally focused the balancing of these interests on an analysis of "three distinct factors":

> First, the private interest affected by official action; second, the risk of erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; finally, the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Mathews, supra, 424 U.S. at 334-335.

A balancing of the private and governmental interests in a disbarment case leaves no doubt that a preponderance of the evidence does not afford sufficient reliability.

A. The private interest affected by disbarment, loss of livelihood earned at great sacrifice of money, effort and time, as well as grave damage to reputation, is indisputably great.

B. The reliability of facts established by only a preponderance of the evidence standard reflects society's conclusion that the litigants should "share the risk of error in roughly equal fashion." Addington v. Texas, 441 U.S. 418, 423 (1979), and that it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous

verdict in plaintiff's favor." In re Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). There can be no doubt that in a disbarment proceeding which, like the instant case, is based in part on facts propounded by parties filing grievances and contested by the attorney, application of a firmer standard of proof could decisively change the outcome.* It is, of course, unnecessary to speculate upon whether it would have done so in petitioner's case. See Santosky v. Kramer, 455 U.S. 745, 770 (1982).

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*Cf. Mathews, in which, because the evidence upon which termination of disability benefits was, for the most part, easily documented medical assessments of the recipient's physical or mental condition, an evidentiary hearing--with its opportunity to raise questions of truth and veracity--would not have changed the result. 424 U.S. at 344-45.

C. The State's interest in disbarment proceedings, as defined in Mathews, provides no impetus for favoring a preponderance of the evidence standard over one providing more factual accuracy: A higher standard of proof will not change the nature of the proceedings, add to their expense, or reallocate limited fiscal or administrative resources. (See Mathews, 424 U.S. at 347-48.) On the contrary, the factfinder will simply apply the more demanding standard of proof to the same deliberations he must perform. To argue that the other State interest--that of protecting the public against incompetent or unethical attorneys--militates for a low grade of factual accuracy in disbarment hearings would be inconsistent with basic constitutional principles.

Surely the State's stake in ensuring the satisfactory conduct of its lawyers is no greater than is its role in protecting its people against criminal injury. Yet, in criminal proceedings "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." Addington v. Texas, supra, 441 U.S. at 423. As this Court has recognized, the interests of an attorney in his reputation and livelihood are themselves of great magnitude. In itself, then, the State's desire to maintain a healthy bar does not justify even courting, much less embracing, a minimal standard of proof

supporting disbarment.*

Application of the Mathews analysis to the instant case compels the recognition that due process requires a greater degree of factual proof than that assured by the minimum standard of preponderance of the evidence. Those

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*The fact that the State's interest in the integrity of its bar is of a sort not discussed in Mathews suggests that in those instances in which a government exercises a police power in a way that affects such basic interests as a person's freedom, liberty to engage in his occupation (or in his vested property interest in his profession), or his liberty to enjoy his good name and reputation, the focus of the due process inquiry should no longer even include the Mathews concern with financial and administrative burdens imposed on the State by greater procedural safeguards. However, Santosky v. Kramer, 455 U.S. 745 (1982), dealing with the standard of proof required in hearings affecting the fundamental liberty interest of parents in their natural children, honors, in passing, Mathew's purely practical measurement of governmental interests. 455 U.S. at 767.

cases dealing specifically with the constitutional sufficiency of various standards of factual security confirm this general conclusion.

2. The Degree Of Factual Security Due Process Requires Is A Reflection Of Society's Assessment Of The Particular Interest At Stake.

> The function of a standard of proof, as that concept is embodied in the due process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudicaton." Addington v. Texas, 441 U.S. 418, 423 (1979), quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

In Santosky v. Kramer, 455 U.S. 745, 755 (1982), this approach is elaborated as follows:

> Addington teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed

between the litigants.

Pursuing Addington's and Santosky's evaluation of differing standards of proof required by due process, it is clear that while disbarment is not a proceeding which may result in incarceration or loss of life and therefore does not require a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment," it is a proceeding in which society has more than the "minimal concern with the outcome" which it has in civil disputes between private parties over money damages. Santosky, 455 U.S. at 755. Konigsberg, Ruffalo and Spevack all indicate that a State's deprivation of an attorney's means of livelihood, with its attendant devastation of reputation, concerns interests which, in

the words of Addington and Santosky, are "both 'particularly important' and 'more substantial than mere loss of money'" and that disbarment proceedings threaten him with a "significant deprivation of liberty"* as well as subject him to a risk of grave "stigma."** Santosky, 455 U.S. at 756. Thus, disbarment requires more factual security than that guaranteed

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*"Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes... the right of an individual...to engage in any of the common occupations of life..." Board of Regents v. Roth, 408 U.S. 564, 572 (1972), quoting Meyer v. Nebraska, 262 U.S. 390, 399. Certainly, after an attorney has earned his license, he has gained--in the terms of "liberty"--the right to practice law.

**An action by a State which only affects a person's reputation activates the due process protection of liberty. See Wisconsin v. Constantineau, 400 U.S. 433 (1971). Petitioner, of course, has lost the practice of his profession as well.

by the minimal one of preponderance of the evidence.

The foregoing reasoning demonstrates that proceedings affecting the interests at stake in the present case properly fall into that category of cases for which this Court "has mandated an intermediate standard of proof--'clear and convincing evidence.'" Santosky, 455 U.S. at 756. The kinds of cases requiring this standard of proof have been a "variety of government-initiated proceedings" such as civil commitment (Addington v. Texas, 441 U.S. 418 (1979)); deportation (Woodby v. INS, 385 U.S. 276 (1966)); denaturalization (Chaunt v. United States, 364 U.S. 350 (1960)); and the termination of parental rights in natural children. (Santosky v. Kramer, 455 U.S. 745 (1982)). The fact

that the initiation of attorney disciplinary proceedings may sometimes be thought of as done under the aegis of a self-regulating bar* does not put disbarment beyond the pale of these cases. Disbarment itself is meted out by the State's highest court, by which time the matter has clearly lost any vestiges of a merely civil dispute between private parties but, instead, has become a vehicle for a State-imposed sanction of a punitive nature.

The overwhelming majority of states recognize that the disbarment of an attorney must be based on proof more

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*In Indiana, the seven members of the "Disciplinary Commission of the Supreme Court of Indiana"--two of whom need not be members of the state bar--are appointed by the Indiana Supreme Court itself. Admission and Discipline Rule 23, Section 6.

reliable than mere preponderance of the evidence. Eighteen states require "clear and convincing" or greater proof and eighteen states set similar, though somewhat differently phrased, standards demanding substantially more factual security than a mere preponderance. Only twelve states are satisfied with the preponderance of the evidence standard which came to be the foundation of petitioner's disbarment.* The Indiana Supreme Court itself in Matter of Moore, 453 N.E.2d 971 (1983), while concluding that the United States Constitution does not require it, stated:

> This intermediate standard of proof, "clear and convincing", more reasonably conforms to this Court's analysis of the nature of the disciplinary process and follows the

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*(See attached table, Appendix E.)

> weight of authority. See, Matter of Palmer, (1979) 296 N.C. 638, 252 S.E.2d 784 and cases cited therein. 453 N.E.2d at 973.

In reviewing the hearing officer's finding of facts in the present case, the Indiana Supreme Court stated that it would apply the "clear and convincing" standard but then, by a rather harsh procedural sleight-of-hand (which is the subject of Argument II, infra), proceeded to "adopt and accept as its own the findings of fact submitted by the hearing officer." (Disbarment Opinion, p. 7 Appendix A.)

Petitioner submits that the relevant cases and weight of prevailing practice demonstrate that findings of fact supporting the drastic losses incurred by disbarment demand a higher standard of factual proof than that upon which his disbarment was based.

II.

THE INDIANA SUPREME COURT'S APPLICATION OF RULE 23, SECTION 15(C), DEPRIVED PETITIONER OF HIS OPPORTUNITY UNDER THE RULE TO GAIN THE COURT'S REVIEW BECAUSE NEITHER THE RULE ITSELF NOR THE COURT'S INTERPRETATION OF IT SUFFICIENTLY APPRISED PETITIONER THAT ONLY THE RULE'S FIRST SENTENCE WOULD BE HELD OPERABLE. THIS VAGUE STANDARD OF OBEDIENCE VIOLATED DUE PROCESS.

It is, of course, settled that this Court will adopt the construction of a State's statute (or procedural rule, as here) by its own court. But a question may yet remain as to whether the statute so construed violates federal constitutional rights. Orr v. Gilman, 183 U.S. 278, 283 (1902).

Brinkerhoff-Faris Trust & Savings v. Hill, 281 U.S. 673 (1930) (in which the Missouri Supreme Court overruled a previous decision denying the existence of an administrative tax remedy and held

that it was too late for the plaintiff to pursue the newly-recognized administrative relief) stands for the general proposition that a court's change of ruling on procedure governing pursuit of a litigant's claims, after the opportunity to comply with the new interpretation has passed, is a deprivation of due process. In Brinkerhoff the administrative avenue to relief had been unequivocally closed off to the plaintiff by the Missouri Court's previous decision. In the instant case, differing interpretations of Rule 23, Section 15(c), are possible. Brinkerhoff is applicable because due process requires reasonable certainty in the description of standards exacting civil as well as criminal obedience.

In Small Co. v. American Sugar

Refining Co., 267 U.S. 233 (1925), a seller of refined sugar sued for the buyer's breach of two contracts of sale. In its answer, the buyer set up two defenses based on the Lever Act's proscription against the exaction for such a product of "more than a reasonable profit" and against contracts for delivery at a future date which "tended to increase the price of sugar and to promote the hoarding thereof." Plaintiff, citing criminal cases brought under the Lever Act, successfully demurred to these defenses on the ground that the asserted provisions of the Act conflicted with the Fifth Amendment's requirement of clear warning in the establishment of forbidden conduct. The Court dismissed the defendant's argument that the "void-for-vagueness" doctrine

applied in the criminal prosecutions was inapplicable to the civil suit at hand, and stated:

> The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. 267 U.S. at 239. (Emphasis added.)*

Zellerbach Paper Co. v. Helvering, 293 U.S. 173 (1934), while not cast in

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*And see Giaccio v. State of Pa., 382 U.S. 399 (1966), in which this Court held unconstitutionally vague a Pennsylvania Act (and the court's explanation of it) providing for the assessment of prosecution costs against defendants acquitted of misdemeanors. In so doing, the Court rejected the Pennsylvania Supreme Court's ruling that because the Act was not a penal statute but merely one for the collection of costs of a "civil character" the void-for-vagueness doctrine did not apply. 382 U.S. at 402.

explicit due process terms, contains an important similarity to the instant case and states a principle which, in extreme situations, like disbarment without fair opportunity for the attorney to complete the litigation of his defense, transcends being a mere rule of statutory construction and becomes a standard for measuring due process. Zellerbach concerned a controversy over the date when the statute of limitations began to run against the levying of deficiency assessments by the Commissioner of Internal Revenue. Controlling the result was the question of whether the Revenue Act of 1921 required taxpayers to file a return, in addition to one properly filed under the Act of 1918, in those cases in which there would be no increase in tax obligation under the 1921 Act. For

almost seven years before assessing large tax deficiencies, the Bureau of Internal Revenue told petitioner nothing about an obligation to file an additional tax form. Furthermore, 1922 Treasury Decisions, by instructing taxpayers who had filed returns under the 1918 Act and who were subject to additional tax under the 1921 Act to file supplemental returns covering such additional tax, implied that additional returns were not required of taxpayers whose taxes were not increased by the new law. In reversing the ruling of the Board of Tax Appeals that the four-year statute of limitations had never started to run because petitioner's return filed under the 1918 Act, was a nullity, Justice Cardozo stated:

> ...A statute would have to be very plain to justify a holding in such

> circumstances that there was an obligation to report anew. Certainly the average man would be slow to suspect that he was subject to such a duty. If he had looked into the Treasury Decisions, he would learn that the Commissioner agreed with him... A statute of uncertain meaning will not readily be made an instrument for so much of hardship and confusion. 293 U.S. at 178.

As in Zellerbach, the conduct-setting language of Rule 23 was not only problematical itself, but its executing authority, the Indiana Supreme Court, interpreted that language in a way which invited the conduct which it later held to be insufficient. The court's surprising renunciation of its flexible standard in favor of an absolute one to which petitioner could no longer conform surely made the Rule "an instrument for.. much of hardship and confusion." Here--unlike Small and Zellerbach--the hardship concerns not just monetary loss

but petitioner's loss of his law license and damage to his good reputation. In such a case, a state court's harsh and unpredictable interpretation of language normally within its exclusive domain should not be immune from the due process requirements of the Fourteenth Amendment. Petitioner submits that due process mandates more clarity in the description of requirements when failure to comply with those requirements results in deprivation of the opportunity to have the Indiana Supreme Court exercise its avowed function as the "ultimate fact finder."*

CONCLUSION

The relevant cases and weight of practice among the States indicate that

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*Matter of Moore, 453 N.E.2d 971, 973 (1983).

due process requires that an attorney should not suffer disbarment and the consequent loss of so hard-earned a livelihood, as well as injury to reputation, on the basis of facts established by the bare minimum standard of reliability, "preponderance of the evidence." Petitioner respectfully submits that the instant case presents an excellent opportunity to settle this important question.

Petitioner further contends that the Indiana Supreme Court's refusal to review his factual challenges violated due process for a twofold reason: First, the procedural rule governing such review is in itself fatally vague; second, the court, in its prior order regarding the rule, interpreted it in a way which not only appeared to resolve the internal

conflict, but excluded the extreme application of the rule that the court exacted at the last minute. Such procedural injustices cannot be allowed to affect the fundamental interests at stake in this case. Petitioner submits that this aspect of his case deserves consideration by this Court as a confirmation of the concept that, in matters affecting such important interests, the State may not place the risk of procedural vagueries upon the individual citizen.

Respectully submitted,

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84-121

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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INDEX TO APPENDICES

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IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

APPENDICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

APPENDIX A

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FOR THE INDIANA SUPREME COURT
DISCIPLINARY COMMISSION

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IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF	)	
	)	Cause No. 880 S 357
ZARKO SEKEREZ	)	

DISCIPLINARY ACTION

Per Curiam

This disciplinary matter is before us on a seven-count Verified Complaint for Disciplinary Action filed against the Respondent, Zarko Sekerez, by the Indiana Supreme Court Disciplinary Commission. A Hearing Officer, appointed by this Court, has conducted a hearing pursuant to Admission and Discipline Rule 23 and has submitted his findings of fact. The Respondent now petitions for

review of these findings. The Respondent also has filed a Motion for Oral Argument, a Petition for a Trial de Novo, and a Petition for Hearing on Constitutional Challenges. Both parties have submitted briefs in support of their respective positions. Respondent's Motion for Oral Argument is now denied.

At the onset of our review of this case, this Court must address the manner in which the Respondent petitions for review and challenges the findings of the Hearing Officer. Admission and Discipline Rule 23, Section 15, defines the procedure for review by this Court of our Hearing Officer's findings. This provision authorizes a petition for review and requires a party who challenges the factual findings to submit with his petition a record of *all* of the evidence relating to the challenged factual issue (our emphasis). Upon examination of the pleadings filed by Respondent, it appears to this Court that the Respondent has chosen not to follow this procedure.

Respondent's "Petition for Trial de Novo" and "Petition for Hearing on Constitutional Challenges" are not in a form recognized under our rules. However, in that the issues raised under such pleadings are in the nature of issues generally presented in a petition for review, they will be so considered.

On the other hand, the record of evidence presented by the Respondent is totally inadequate. Respondent, in support of his petition for review, filed only a transcript of the testimony of his witnesses. In overruling the Disciplinary Commission's objection and request for an order from this Court directing the Respondent to supplement the record to present all evidence on the challenged issues, this Court noted that

> ". . . the findings of the Hearing Officer are a sufficient basis for the imposition of discipline and that it is incumbent on the petitioning party to present a sufficient record to countermand the significance of the Hearing Officer's findings. If the record submitted is insufficient, the petitioning party must stand

> on it; if the petitioning party attempts to practice obfuscation, he must accept the consequences."

This Court finds that a transcript containing only one party's case in chief does not constitute all of the evidence as required under the above noted rule.

Before reviewing the specific charges, several preliminary issues raised by Respondent's pleadings must be considered. In his Petition for Trial de Novo, Respondent asserts that he did not receive a fair hearing; he contends that:

> 1) The Hearing Officer was biased and prejudiced against the Respondent;
>
> 2) The findings of the Hearing Officer were based on perjured testimony; and
>
> 3) The Hearing Officer did not determine whether misconduct was proved by a preponderance of the evidence as required by Admission and Discipline rule 23, Section 14(d).

In support of Respondent's first contention, Respondent sets forth ten alleged grounds. Respondent generally avers that the Hearing Officer took an extended length of time to adopt, in toto, the proposed findings submitted by the Disciplinary Commission; the Respondent asserts that all controverted testimony was found in favor of the Disciplinary Commission and that several of the findings were not supported by the evidence. And the Respondent objects to several rulings during the course of the hearing and the manner in which the hearing was conducted.

The adoption by the Hearing Officer of one party's proposed findings does not constitute grounds for challenge. The parties have the same opportunity to present evidence and argue the merits of their respective positions; it is not error to be persuaded by one of the parties. *In re Zinman*, (1983) ..... Ind. ....., 450 N.E.2d 1000. Nor does an adverse ruling constitute error. *In re Kessler*, (1979) 397 N.E.2d 574, cert. denied 449 U.S. 829.

To establish error predicated on the alleged bias and prejudice of a Hearing Officer (or judge), Respondent must demonstrate by a valid and complete record that the alleged bias or prejudice stems from an extra-judicial source and results in an opinion on the merits on some basis other than what was learned through participation in the case. *United States v. Grinnell Corporation*, (1966) 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778; *United States v. English* (7th Cir.), (1974) 504 F.2d 1254, cert. denied; *Hubbard v. U.S.*, 419 U.S. 1114, 95 S.Ct. 791, 42 L.Ed. 2d 811. Reviewing that which has been filed in this cause, this Court finds that Respondent has not demonstrated bias and prejudice on the part of the Hearing Officer.

As a second contention to his Petition for Trial de Novo, Respondent further argues that the Hearing Officer based his findings on allegedly perjured testimony. Though such a challenge goes to the credibility of witnesses and is to be properly resolved in this Court's ultimate review of the facts, in that the Respondent is contending these adverse rulings may have a cumulative or corroborative effect, we would be inclined to consider it at this juncture. However, as with many of Respondent's other contentions, we find that he had failed to present an adequate record from which this Court can make an informed decision.

As his third contention, Respondent asserts that he is entitled to a new hearing by reason of the Hearing Officer's failure to rule within thirty days as required under our rules. This Court has previously held that the expiration of the thirty day time period under Admission and Discipline Rule 23, Section 14(d), without further showing of impairment, does not establish a constitutional infirmity. *In re Zinman*, Supra., *In re Wireman*, (1977) 270 Ind. 344, 367 N.E.2d 1368, cert. denied 436 U.S. 904, 98 S.Ct. 2234, 46 L.Ed.2d 402.

Respondent argues that the nine month delay in the Hearing Officer's ruling made appeal more difficult and diminished the recall of events. The proceedings were

reported and a complete transcript was available. An adequate record at the time of hearing would have preserved any issue the Respondent deemed worthy of review by this Court. There has been no showing that the delay in ruling destroyed the fundamental fairness of the disciplinary process. As this Court noted in its prior order, "if the record submitted is insufficient, the petitioning party must stand on it . . .".

In view of the above considerations, this Court denies the relief sought in Respondent's Petition for Trial de Novo.

In his Petition for Hearing on Constitutional Challenges, the Respondent contends that the Hearing Officer erroneously ruled that he could not hear Respondent's challenges and did not give the Respondent an opportunity to present evidence relating to his constitutional challenges. In support of this contention the Respondent has submitted a single page excerpt of the transcript of the hearing, which reads as follows:

> MR. SEKEREZ: My constitutional issues, Your Honor.
>
> THE COURT: Okay. I'm trying to figure—I don't know what bearing this would have on that cause.
>
> MR. HUGHES: The record is full of constitutional issues. He's filed a motion to stay, he's filed them in the Federal Court, he's filed them in the State Supreme Court that Your Honor has no jurisdiction to determine any constitutional issue, and he has raised them in his pleadings, in his answer, in his affirmative defense, and I think that any further expounding on those, would be superfluous to the record.
>
> THE COURT: I can't—I think a record has been made of that fact, and I don't see any—I can't make a decision one way or another on that issue.
>
> With that, I'm going to go back again to the point. Mr. Hughes, do you want to make an opening statement at all?

MR. SEKEREZ: Is it my understanding that Your Honor is not going to adjudicate on the issues?

THE COURT: What? The constitutional issues?

MR. SEKEREZ: Yes, sir.

THE COURT: I don't think I have authority to make that kind of a ruling on those issues. I've made a ruling of the fact that I do not have authority to do that.

Predicated on the record submitted, Respondent now argues that he was not afforded due process at the hearing stage and accordingly should be allowed a further hearing to present his evidence and make his constitutional arguments. He has presented no authority defining such due process entitlement.[1] Other than the above cited excerpt, Respondent has demonstrated no offer of excluded evidence at the trial stage nor advanced an argument as to why the presentation of constitutional issues to this Court would be inadequate. This Court cannot suppose a record and argument.

In light of these considerations, Respondent's request for a new hearing is denied. However, as previously noted, the constitutional issues he raises in this pleading will be treated as if properly raised in a Petition for Review.

As a final preliminary matter, we note that the Respondent also urges, in a single sentence, that Admission and Discipline Rule 23, Section 14(f), which provides for the "preponderance of evidence" standard of proof for disciplinary cases, is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. The Respondent makes no attempt to sub-

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[1] Respondent cites *Middlesex County Ethics Committee v. Garden, Etc.*, (1982) 102 S.Ct. 2515. This case involved the federal court's policy of abstention in state proceedings. It does not define due process entitlements to hearing. Whether or not a federal court would entertain jurisdiction is not an issue before this Court.

stantiate this contention. However, in the recent case of *In re Moore*, (1983) Ind., ... N.E.2d ....., this Court re-examined the standard of proof applicable to these cases and determined that the "clear and convincing" standard of proof more reasonably conforms to our analysis of the nature of the disciplinary process and follows the weight of authority. Accordingly, we will review the evidence in this case under a "clear and convincing" standard.

Turning now to an examination of the charges filed and the evidence of record, we again note that Respondent has chosen not to follow the procedure for challenging the Hearing Officer's findings of fact. As this Court has stated in the past, a hearing officer's findings are treated with due deference, but they are not controlling. *In re Zinman, Supra; In re Callahan*, (1982) ..... Ind. ....., 442 N.E.2d 1092; *In re Crumpacker*, (1978) 268 Ind. 630, 383 N.E.2d 36. Our rules require, however, that "in the event a party does not concur in a factual finding made by the hearing officer . . . , such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue". Admission and Discipline Rule 23, Section 15(c). As previously held, the transcript submitted by the Respondent did not comply with our rule. Therefore, in that the Respondent has not provided the requisite record to assert error and in that the Disciplinary Commission has not submitted any record, this Court now adopts and accepts as its own the findings of fact submitted by the Hearing Officer and will only review the conclusions thereunder and the Respondent's constitutional challenges.

COUNT I

Under Count I, the Respondent is charged with violating Disciplinary Rules 7-101(A)(1) and 1-102(A)(6) by knowingly failing to appear at a hearing on behalf of a client.

In accordance with the Hearing Officer's findings of fact, we find generally, that the Respondent is a member of the Bar of this State heretofore admitted on May 19, 1965.

On or about January 25, 1979, Katherine Carter went to the Respondent's Merrillville Legal Clinic and retained the Respondent to obtain a court order to allow her to remove her minor son to Tennessee. The Respondent quoted Carter a total flat fee of $200 and collected the same at their meeting. Carter informed the Respondent during their conference that she would be moving to Tennessee within a week, and the Respondent advised her that such a move was proper.

Thereafter, the Respondent filed in the Lake County Superior Court a petition to remove the minor child. On February 21, 1979, at Respondent's request, the petition was set for a hearing at 11:00 A.M. on March 27, 1979, as a "secondary setting". The Respondent never attempted nor made any service of the petition or notice of the hearing upon Carter's ex-husband. The Respondent did not advise Carter of the hearing date. However, upon calling Respondent's office, Carter was advised of the hearing and was told by a secretary that the Respondent was unable to appear with her and that the hearing would likely be continued.

Carter called the court on the date of the hearing and was informed that her petition was still set for a hearing that morning and that the primary setting had been continued as of 10:30 A.M. the previous day. After the Court attempted and failed to locate the Respondent, the following entry was made:

> ". . . petitioner's attorney ZARKO SEKEREZ, fails to appear even though his office was contacted by phone by the Bailiff of this Court. Neither Atty. Sekerez or any member of his Legal Clinic appeared . . ."

The Court also advised Carter that if her ex-husband was not notified of the filing of the petition or the hearing date, the order could be set aside at a later date and Carter would have to appear again for a hearing.

Upon her return to Tennessee, Carter wrote the Respondent requesting the return of the $200 fee. The Respondent wrote back refusing any refund and advising her

that had he attended the hearing he would have charged another $250. Eventually, the Respondent returned the $200 fee but not until Carter filed a grievance against him with the Disciplinary Commission.

The Respondent does not challenge these facts. He even concedes that he intentionally did not appear. He contends that the findings are insufficient to constitute a violation in that his decision not to attend a "secondary setting" hearing is simply an exercise of professional judgment and is not intentional failure to seek his client's lawful objectives.

Though there are many times in a proceeding when an attorney has a great deal of latitude in using his professional judgment for strategic purposes, an intentional decision to totally ignore a scheduled hearing is not one of those discretionary matters. It is the lawyer's paramount duty to monitor his client's case and to check with court records and personnel as to any developments. In this instance the Respondent made absolutely no effort to follow up on the hearing scheduled as a "second setting" but, as he concedes, chose not to appear. The element of intent of this charge may be established by resort to reasonable inferences based on an examination of the surrounding circumstances. *In re Vincent* (1978), 268 Ind. 101, 374 N.E.2d 40. Respondent's intentional failure to act may be presumed from his voluntary acts. *In re Price* (1982) Ind., 429 N.E.2d 961; *In re Vincent, Supra.*

Respondent's position that Disciplinary Rule 7-101(A)(1) is obviously and clearly unconstitutional is not at all obvious and clear. In that his broad assertion is completely unsubstantiated by any authority, we find it to be meritless. Respondent's constitutional challenges for vagueness of Disciplinary Rule 1-102(A)(6), which proscribes conduct that adversely reflects on an attorney's fitness to practice law, is similarly unsupported by any authority. A disciplinary rule will not be found to be overbroad or vague and, hence, constitutionally infirm, when the subject rule is commonly understood by reasonable men and particularly by attorneys. See *In re Perrello* (1979), Ind., 394

N.E.2d 127. There is no doubt that an intentional and unexcused failure to appear for a scheduled hearing on a client's case not only constitutes a breach of the attorney-client fiduciary relationship, but is understood by lawyers and laymen alike to reflect adversely on the attorney's competence and fitness to represent others.

Respondent's claim that these rules are unconstitutional because they are being applied in a capricious or arbitrary fashion is similarly unsubstantiated by any cogent argument, authority or record and, as such, is meritless.

In light of our considerations and the findings of fact regarding Count I, we find that the Respondent did engage in the misconduct as charged and that such misconduct is violative of Disciplinary Rules 7-101(A)(1) and 1-102(A)(6) of the *Code of Professional Responsibility.*

COUNT II

On or about February 14, 1979, Mark Ward retained the Respondent to defend him in a suit brought by Sears Department Store in the Gary City Court. Ward paid the Respondent a $50 retainer fee and the Respondent agreed to enter his appearance and to negotiate with the Sears' attorney the remaining balance on the account owed by Ward.

In April of 1979, an agreement was reached whereby the litigation would remain open and Ward would pay Sears, through its attorney, $50 per month. The Respondent never thereafter discussed the case with Ward, though in May, 1979, Ward attempted on several occasions to learn the status of the case from the Respondent. Commencing in July, 1979, and for several months thereafter, Ward was absent from work on sick leave, was hospitalized, and was unable to make any payments to Sears or its attorney.

The Respondent, after being advised by the Sears attorney that Ward had not paid the agreed monthly payments, withdrew his appearance for Ward on August 21,

1979. The Respondent never attempted to notify Ward of his contemplated withdrawal and the Respondent knew that Ward had no knowledge of such intended withdrawal.

Thereafter, Sears reduced its suit to judgment. Ward returned to work on October 15, 1979. He received his first pay check on October 30, 1979, to discover that his wages had been garnished to partially satisfy the Sears judgment. On several occasions Ward requested the return of his file from the Respondent, but the Respondent never complied.

The Respondent contends that he gave notice to the client. We are unpersuaded by his contention in light of our earlier determination as to the incomplete record submitted by the Respondent.

The Respondent further argues that he fulfilled his duty to his client and that any resulting prejudice was not foreseeable but was caused by others, such as the Gary City Court personnel. Such argument is wholly misdirected because it fails to answer the specific charge of failing to take reasonable steps to avoid foreseeable prejudice to the rights of his client. Withdrawing, without giving notice to the client, did not give the client an opportunity to even appear *pro se* since he was unaware that he was no longer represented. The resulting sequence of events, i.e., a judgment and garnishment without the client's knowledge, were fully foreseeable and are the sort of unfortunate consequences which are intended to be prevented through Disciplinary Rules 2-110(A)(2) and 1-102(A)(5). The Respondent's challenge to the former rule is unsubstantiated by any record or authority and, as such, is meritless. As to Disciplinary Rule 1-102(A)(5), the Respondent argues that its application should be restricted to instances involving "obstruction of justice". This Court has repeatedly found conduct which is damaging to the client to be conduct prejudicial to the administration of justice. See *In re Zinman, Supra; In re Gibson* (1983), Ind., 444 N.E.2d 852; *In re Lytal* (1983), Ind., 444 N.E.2d 853; *In re Morris* (1982) Ind., 440 N.E.2d 675. In light of this established and commonly understood interpreta-

tion of the rule within this State, we find Respondent's contention unconvincing. Respondent's contention that Disciplinary Rule 1-102(A)(5) is unconstitutionally vague and overbroad is not supported by any authority and is similarly unconvincing.

In accordance with the foregoing considerations and with the findings of fact under Count II, we find that the Respondent engaged in the misconduct as charged and that such misconduct is violative of Disciplinary Rules 2-110(A)(2) and 1-102(A)(5) of the *Code of Professional Responsibility.*

COUNT III

In Count III of the Verified Complaint, the Respondent is charged with making a false advertisement and misleading a client, aiding a non-lawyer in the unauthorized practice of law and engaging in conduct involving deceit and misrepresentation.

Adopting the Hearing Officer's findings we now find that Susan McCoy responded to an advertisement by the Respondent in the yellow pages of a telephone directory. The advertisement was listed under "Merrillville Legal Clinic" and it advertised "No Charge for Initial Consultations". McCoy made an appointment with the Merrillville Legal Clinic in April of 1979 concerning a dissolution of marriage. Upon her visit, McCoy was directed by a receptionist to fill out certain forms in order to process the divorce. She was further instructed by the receptionist to pay one-half of the attorneys fee of $200. McCoy paid $100, filled out the forms and was told to return in June when she had satisfied her six (6) month Indiana residency requirement. McCoy did not receive an initial consultation with a lawyer, free or otherwise.

On June 5, 1979, McCoy returned to the Clinic, executed her petition for dissolution, and was told by the receptionist that it would be sixty days before a final hearing could be held. McCoy again did not consult with a lawyer. Thereafter, McCoy called on two occasions to seek legal

advise. In both instances she was advised by law students. In her first call she asked about the consequences of her husband having hired a lawyer to contest the divorce. She was told by a law student that there would be an increase in the attorney's fee of $20 and, further, that there would be no legal problem associated with the contest since the basis for her petition was on "irretrievable breakdown". McCoy's next call was to inquire about possible legal problems resulting from her intended move to California before the final hearing. A non-lawyer law student advised her that there would be no legal problem if she returned for the hearing. McCoy relied upon this advice and thereafter moved to California.

Following the sixty day "waiting period" McCoy made several telephone calls to the Merrillville Legal Clinic to determine the hearing date for the divorce. She spoke with a secretary and a law student. The latter informed her that she must pay the balance of the fee, $128, which McCoy did. Thereafter, a secretary in the Clinic advised McCoy that the final hearing date was September 14, 1979, at 11:00 A.M. in Crown Point, Indiana.

McCoy returned to Indiana as instructed and appeared in the court at the appointed hour to find that no hearing had ever been set in Crown Point for McCoy's dissolution. At that time and place McCoy first met and spoke with the Respondent. McCoy had never spoken with a Merrillville Legal Clinic attorney concerning the dissolution until this meeting with the Respondent on September 14, 1979. He did not have her file and then discovered that the case had been venued in August to East Chicago on a motion for change of judge filed by opposing counsel. The Respondent attempted to arrange a hearing on that day but was unsuccessful. He informed McCoy that her husband was demanding a cash settlement of approximately $800 including the husband's attorney's fees of $600. The offer had been made to the Respondent in writing by opposing counsel on August 6, 1979, but the Respondent had never communicated this to McCoy. The Respondent also advised McCoy that, contrary to the law

student's advice, the Respondent could represent her without her presence. He suggested to McCoy that she agree to pay the opposing counsel's attorney's fees, but return to California and not pay the fee. He further agreed to refund his fee.

The Respondent now argues that the evidence is insufficient to support a finding that McCoy was not given a free consultation with a lawyer as advertised because, he contends, the Commission failed to prove that the woman who saw McCoy at the clinic was not a lawyer. This contention is not convincing. McCoy went to the Clinic in response to a specific advertisement for a free initial consultation. She was only asked questions for the purpose of completing a prepared form. Providing this information to a person who is filling out a form does not constitute a consultation. The fact that other clients may have, as Respondent argues, received the advertised free consultation with a lawyer has no bearing on the fact that McCoy did not.

The Respondent also contends that the evidence is insufficient to prove that he aided a non-lawyer in the unauthorized practice of law. We disagree. There is no doubt that law students in the Respondent's legal clinic answered McCoy's telephone inquiries concerning legal matters. The Respondent cannot avoid all responsibility by simply arguing that he did not know how his staff worked. In *In re Price, Supra*, we analogized the scienter element of a disciplinary charge to the definition of "knowingly" as it relates to criminal culpability and found that the Indiana General Assembly has defined "knowingly" as follows:

> (b) A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so. IC 35-41-2-2(b).

Even though Disciplinary Rule 3-101(A) had no requirement of specific knowledge, the evidence in this case satisfies the above definition. The Respondent was McCoy's attorney and yet, from April of 1979, to September 14,

1979, the date of their first meeting for a mistaken appearance in the wrong court, he had never spoken or met with her. The Respondent's obvious unfamiliarity with the case is evidenced by his lack of knowledge as to the status of the case. It is clear that a pleading had been prepared and filed and McCoy's legal questions had been answered over the telephone. She was made aware on more than one occasion that she was consulting with law students working there. Ethical Consideration 3-6, which Respondent cites as authority for delegation of duties to clerks, secretaries and other lay persons, makes that delegation conditional upon the lawyer maintaining a direct relationship with his client, supervising the delegated work and retaining complete responsibility for the work product. These conditions were not met in McCoy's case.

We, therefore, conclude that the evidence is more than sufficient to convince us that the Respondent was aware of a high probability that his non-lawyer employees had prepared the McCoy case and had answered her legal questions.

As with the other disciplinary rules under which he is being charged, the Respondent challenges the constitutionality of Disciplinary Rules 2-101(A), 3-101(A) and 1-102(A)(4) in their application to the Respondent under the facts of this count. In that these challenges are mere blanket assertion and are not supported by any authority, we are inclined to find them meritless. We conclude, from the foregoing findings and considerations, that the Respondent engaged in the misconduct as charged under Count III.

COUNT IV

In Count IV the Respondent is charged with neglecting a legal matter entrusted to him and failing to carry out a contract of employment entered into with a client in violation of Disciplinary Rules 6-101(A)(3) and 7-101(A)(2).

On February 13, 1977, Judy Gibboney retained the Respondent's legal clinic in Indianapolis, Indiana, to handle

her divorce. Mr. Gibboney, who accompanied his wife, paid a $50 retainer and $38 filing fee. David Muir, an attorney employed by the Respondent, gave Gibboney a receipt in the name of Respondent's Indianapolis clinic and promised that the divorce petition would be filed within a week.

Muir had been employed by the Respondent only a few weeks. Pursuant to the Respondent's instruction to forward all matters to the Merrillville clinic for processing, Muir forwarded the Gibboney paperwork there on February 13, 1979.

During the next three weeks, the Gibboneys called several times to inquire about their divorce petition. Muir advised them that the delay was caused by typing problems at the Merrillville Legal Clinic. On March 6, 1979, the Gibboneys called Muir requesting that he not proceed with the case and that he return the retainer and filing fees. Muir informed them that only Respondent can authorize refunds and that they will have to discuss the matter with the Respondent in Merrillville. Mr. Gibboney called the Respondent but the Respondent never returned his calls. Someone at Respondent's Merrillville office offered to refund the $38 filing fee. After Gibboney filed a grievance with the Disciplinary Commission, the Respondent refunded $88.

We have examined the foregoing findings and are inclined to conclude that, although the Respondent's instructions as to the operation of the clinic were indirectly responsible, they are insufficient to prove that the Respondent himself neglected a legal matter or failed to carry out a contract of employment entered into with a client. We, therefore, conclude that a violation of Disciplinary Rules 6-101(A)(3) and 7-101(A)(2) has not been proved.

COUNT V

The findings under Count V show that on July 19, 1978, Linda Hatcher was involved in a minor automobile acci-

dent resulting in $140 damage to her car. On August 8, 1978, James Hatcher, Linda's husband, filed a small claims suit in Lake County to recover said damages. James Hatcher had met the Respondent in September of 1978 when Hatcher had interviewed with the Respondent seeking employment in Respondent's engineering company. Later, having read Respondent's advertisement for "No Charge for Initial Consultations" in the yellow pages of the telephone directory, and on the recommendation of a friend, Hatcher made an appointment with the Respondent through Respondent's Merrillville clinic.

On November 29, 1978, after the Respondent failed to appear for two scheduled appointments, the Hatchers met with a Mrs. Saviola of the Respondent's Merrillville Legal Clinic. They believed that Saviola was a lawyer and showed her all their documents concerning the case. Saviola, who was in fact a secretary at the clinic, examined and retained the documents and recovered a $50 retainer.

Thereafter, the Hatchers received a letter dated November 28, 1978, from the Respondent advising them that he had accepted the case. On December 29, 1978, the Respondent entered his appearance in the Hatcher case which had been scheduled for trial on January 3, 1979. The Respondent failed to appear at the trial and the case was dismissed without prejudice.

On January 19, 1979, the Hatchers received from the Respondent's office a proposed complaint to be filed on their behalf in the Lake Circuit Court relating to the accident and seeking compensatory and punitive damages in excess of $12,500. This cause was filed on February 21, 1979.

During the first three months of 1979, the Hatchers repeatedly called the clinic. They also paid an additional $25 on their account with the Respondent. The Respondent never returned their calls nor answered their letters. The Hatchers were never able to discuss their cases with any other attorney at the clinic.

On March 13, 1979, the Hatchers received, through the Respondent's clinic, a request for production of documents and a set of 62 interrogatories from defendant's counsel in their lawsuit. They tried to schedule an appointment with the Respondent concerning these, but the Respondent failed and refused to see them or return their calls.

On April 30, 1979, the Respondent wrote the Hatchers and told them he was withdrawing from their case. His motion to withdraw was granted by the court on the day set for a hearing on defendant's motion to dismiss the Hatcher case and the Hatchers were granted a 30 day continuance. They requested the return of their file from the Respondent, but he refused. On November 13, 1979, the defendant's motion to dismiss was granted with prejudice.

The Respondent challenges many of the foregoing findings contending that there is evidence to the contrary. We must again point out that the Respondent has submitted an incomplete and misleading record containing only those matters most favorable to his position and excluding the testimony of the Commission's witnesses. As in the earlier instances, we must disregard such record. Furthermore, the existence of evidence which the Respondent claims is contrary to the findings, only goes to the weight of the evidence and the credibility of the witnesses. The Hearing Officer has concluded, from what was presented before him, that the foregoing findings are in fact supported by sufficient evidence. We have adopted such findings. Accordingly, we conclude that Respondent's advertisement for a free initial consultation was false and misleading in that the Hatchers never received a consultation with any lawyer at the Respondent's clinic. Such conduct is in violation of Disciplinary Rule 2-101(A).

The Respondent also contends that there is no finding to support a conclusion that he refused to return papers to which the Hatchers were entitled. We disagree. The clients requested their file and the Respondent refused to return it, any part of it. It is implicit in this finding

that an attorney who has filed a $12,500 complaint for a client has documents and pleadings which are necessary for the continued litigation of the matter and to which such client is entitled. Furthermore, in their initial meeting with Saviola, the Hatchers gave all their documents to her and she retained the same. It is our conclusion that the Respondent did refuse to return the Hatcher file to which the Hatchers were entitled and, thus, withdrew from a case without taking all reasonable steps necessary to avoid foreseeable prejudice to them. Such conduct is violative of Disciplinary Rule 2-110(A)(2).

The Respondent contends that the findings are insufficient to support a conclusion that he violated Disciplinary Rule 1-102(A)(5) and (6) by delegating the interviewing of his client to a secretary and by refusing to consult with the clients. We find to the contrary. Respondent undertook to represent these clients, allowed their small claim suit to be dismissed and filed a $12,500 claim without ever discussing their case with them. He forwarded to these laymen a set of discovery papers, again without ever discussing these important matters with them. He never returned their numerous inquiries and letters about their case. An attorney-client relationship should be one based on trust. Under these circumstances, Respondent's treatment of the Hatchers and their case does reflect adversely on his fitness to practice law, is prejudicial to the administration of justice and is violative of Disciplinary Rules 1-102(A)(5) and (6).

Examining the findings in respect to Disciplinary Rule 7-101(A)(2) and (3), we find that they establish Respondent's callous neglect of the Hatcher case. He failed to answer their numerous inquiries and withdrew in violation of Disciplinary Rule 2-110(A)(2). By this conduct, he failed to carry out his contract of employment and thereby violated Disciplinary Rule 7-101(A)(2). Respondent's failure to consult with the Hatchers, his withdrawal and refusal to return their file resulted in a dismissal of their case. Such conduct prejudiced and damaged the Hatchers and is thus violative of Disciplinary Rule 7-101(A)(3).

Once again, the Respondent challenges the constitutionality of the Disciplinary Rules under which he is charged in a broad and conclusory manner. In that his contentions are conclusory and not supported by authority, reliable record or convincing argument, we find them without merit.

COUNT VI

In Count VI of the complaint the Respondent is charged with improper use of a trade name in connection with the operation of his Legal Clinics in violation of Disciplinary Rule 2-102(B); with advertising such trade name and thus violating Disciplinary Rule 2-101(A); with advertising his clinics in pamphlets constituting professional notices not authorized by Disciplinary Rule 2-102, thus violating Disciplinary Rule 2-102(A).

We find that the Respondent is the sole proprietor of numerous "legal clinics" located in several cities within Indiana. At the time of the final hearing in this cause, he owned such clinics in Merrillville, Indianapolis, Lafayette, Rensselaer, Ft. Wayne, South Bend, Valparaiso, Michigan City, East Chicago and Hammond. All of said clinics are named for the particular city in which they are located, e.g., "Merrillville Legal Clinic", "Indianapolis Legal Clinic", "Lafayette Legal Clinic", etc. The Respondent and his legal clinics engaged in extensive advertising, particularly in local newspapers and the yellow pages of the telephone directories published in the various locales. The Respondent also has advertised his legal clinics through pamphlets made available to visitors in several of his offices. These pamphlets also advertise the clinics, under the name of the particular city.

Some of Respondent's past advertisements in newspapers and via pamphlets contain the name of the clinic but do not disclose Respondent's identity or his association with the clinics. The bulk of Respondent's past and present newspaper advertising contained both, the clinic name and the Respondent's name. However, his name is

always smaller, far less bold, and inconspicuous compared to the print which contains the name of the clinics. Respondent's past and present advertisements in the yellow pages of the telephone directory also contain the clinic's name and Respondent's name, and again the printing of Respondent's name is always much smaller, far less bold, and inconspicuous compared to the print which contains the clinic's name. Additionally, the clinic's name frequently appears in the alphabetical listings of attorneys in the yellow pages under the first letter of the city in the name and without Respondent's name (e.g., "Merrillville Legal Clinic 769-8584").

It is Respondent's contention that the geographic designations which he used in naming his clinics do not constitute "trade names", and that said term has never been defined in Indiana. We disagree with his position. A trade name has in fact been defined in Indiana to include the location:

> "Trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or a class of goods, but which are not technical trademarks, either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation, by one as trademarks." *Hartzler v. Goshen Churn & Ladder Co.*, 55 Ind.App. 455, 104 N.E. 34 (1914).

The fact that this definition was framed in 1914 does not make it any less valid as the Respondent seems to argue. Other jurisdictions have also recognized that the use of a geographic location as part of the name of a professional practice constitutes a trade name and have found such use improper. See Gen. *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979) (Optometry); *In re Oldtowne Legal Clinic*, 285 Md. 132, 400 A.2d 1111 (1979) (Law).

It is Respondent's further contention that both, the prohibition against the use of trade names found in Disciplinary Rule 2-102(B) and the advertising regulations found in Disciplinary Rule 2-102(A) are unconstitutional restraints on useful commercial speech which is protected by the First Amendment of the Constitution of the United States.

Advertising by attorneys and its regulation has in recent years undergone new examination and re-definition. The Respondent places great emphasis on the holding by the U.S. Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The issue decided there was an extremely narrow one, i.e., whether lawyers may advertise the prices at which certain routine services will be performed. In ruling that the flow of truthful advertisement concerning the availability and terms of routine legal services may not be restrained by the application of an Arizona Disciplinary Rule which prohibited a lawyer from publicizing himself as such in advertisements and announcements, the Supreme Court recognized that advertising by attorneys may be regulated though it may not be subjected to blanket suppression. The Court listed several instances of clearly permissible limitations, including false, deceptive or misleading advertisements, restrictions on the time, place and manner of advertising, or advertising concerning transactions that are themselves illegal. See *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973). The United States Supreme Court has recognized that advertising for professional services poses special risks for deception by stating:

> Because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. Id. at 383. *In the Matter of R.M.J.*, 455 U.S. 191, 71 L.Ed.2d 64, 102 S.Ct. 929 (1982).

In *In the Matter of R.M.J., Supra,* the U.S. Supreme Court summarized the commercial speech doctrine, in the context of advertising for professional services, as follows:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.
>
> . . .
>
> Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. 455 U.S. at p. 203.

This doctrine emanated from the Court's earlier holdings in *Bates, Supra,* in *Ohrarik v. Ohio State Bar Association,* 436 U.S. 447, 56 L.Ed.2d 444, 98 S.Ct. 1912 (1978), and *Friedman v. Rogers, Supra.* In the latter case the U.S. Supreme Court specifically addressed a prohibition on the use of a trade name by a professional group, "Texas State Optical."

> A trade name is, however, a significantly different form of commercial speech from that considered in *Virginia Pharmacy* and *Bates.* In those cases, the State had proscribed advertising by pharmacists and lawyers that contained statements about the products or services offered and their prices. These statements were self-contained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined

> associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.
>
> The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. (Footnote deleted) 440 U.S. at 12, 13.

We find that the same rationale proscribing the use of a trade name in the professional practice of optometry, is fully applicable to the practice of law. It is this inherently misleading characteristic which is the basis for our Disciplinary Rule. Ethical Consideration 2-11 of the *Code of Professional Responsibility* emphasizes this point by stating:

> The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility and status of those practicing thereunder.

The entire manner of operation of Respondent's legal clinics, as revealed by these findings, suggests that there was in fact a great deal of misunderstanding as to the identity, responsibility and status of those practicing and working in the legal clinics.

In light of the foregoing considerations, we conclude that the Respondent did violate Disciplinary Rule 2-102(B) by practicing under a trade name and that said Rule is not constitutionally infirm.

The Respondent is also charged with advertising his clinics in pamphlets constituting professional notices not authorized by Disciplinary Rule 2-102, thus violating Dis-

ciplinary Rule 2-102(A). In reviewing the subject pamphlets it is extremely difficult to find a single fact which may be called useful commercial information from which a layperson can make an informed decision. The pamphlets do not contain any specific fee lists or credit arrangements. They do not even contain the name of a lawyer, not to mention his qualifications. They are in fact urging the public to use the legal clinic by making such statements as:

> "Trouble is, most legal services can set you back an arm and a leg if you consult a lawyer under normal legal circumstances. But that may be changing." Valparaiso Legal Clinic, Exhibit C-2, p. 2; Indianapolis Legal Clinic, Exhibit D, p. 2.

However, we need not further scrutinize the entire content of such pamphlets. Even if some of the information contained therein is constitutionally protected, the fact remains that they are advertised under a trade name and do not reveal the identity of the lawyers practicing thereunder. The Respondent cannot indirectly accomplish what is prohibited directly. He cannot practice under a trade name nor can he advertise such trade name. As found earlier, the inherently misleading nature of the use of trade names makes their advertisement subject to state regulation. See gen. *Friedman v. Rogers, Supra.* Thus, we conclude that the publication of advertising pamphlets under the various trade names is violative of Disciplinary Rule 2-102(A). The Respondent urges that the Rule is constitutionally infirm. We need not go beyond the issue presented to us here by Respondent's case. Respondent's advertisement of a prohibited trade name is not constitutionally protected and the regulation thereon found in Disciplinary Rule 2-102(A) is not constitutionally infirm. Respondent's further challenges to Disciplinary Rule 2-102(A) and (B) as being overbroad and selectively applied to him are wholly unsupported by any record or authority and, accordingly, we find them meritless.

The Respondent argues that the use of trade names in his practice is not violative of Disciplinary Rule 2-101(A).

Said rule proscribes the use of false, fraudulent, misleading, deceptive, self-laudatory and unfair statements in any public communication. We have already found, under earlier counts, that the Respondent violated said Rule by specific false statements. In this count, however, he is charged with violating the Rule by advertising his practice under a trade name. There is no doubt that the use of a trade name is inherently misleading, particularly as to the responsibility over employees and the duty owed by lawyers. The findings under Count III, IV and V portray the operation as one in which professional responsibility and accountability could not be fixed with any one. The authority, identity and status of the clinics' staff were often unclear to the clients. This general lack of professional accountability is most apparent under Count IV, where the client's case was delayed and neglected, a receipt was given in the name of the Indianapolis Legal Clinic but yet the attorney was not the Respondent but an employee operating under the Respondent's instructions. This only convinces us further of the inherently misleading nature of practicing under a trade name. The use of such a trade name in a public communication is similarly inherently misleading.

In conclusion, we hold that the Respondent did practice under a prohibited trade name, did advertise said trade name in violation of Disciplinary Rules 2-102(A) and (B); he did use a public communication containing an inherently misleading designation in violation of Disciplinary Rule 2-101(A).

COUNT VII

In Count VII of the complaint, the Commission incorporates the facts of all the preceding counts and once again charges the Respondent with violating some, but not all, of the same Disciplinary Rules charged under the earlier counts. We agree with Respondent's contention that in effect he is being charged with the same violation twice, once individually under each specific count and later, cumulatively under one count. In that the charges and

findings under Count VII are repetitive, we find that they should be dismissed.

Having determined that the Respondent has engaged in misconduct we must evaluate the appropriate sanction. Taken individually, the violations may not appear to be of a magnitude which would indicate a severe sanction. However, when examined as a whole, the numerous violations suggest that Respondent's entire system of clinics was operated in an unprofessional manner. The Respondent made false advertisements for free initial consultations which in fact were never given. He allowed nonprofessional staff to give legal advice to clients. He blatantly neglected clients' cases and refused to return their files and fees. When complication arose in a case, the Respondent abandoned his clients.

Respondent contends throughout his pleadings that the legal clinic is a novel way of providing routine legal services at a lower price. That may well be true. However, the organization set up by the Respondent and the entire mode of operation served to diffuse the professional responsibility owed by an attorney to his clients. The professional service provided was less than adequate. The novelty in Respondent's approach was his elevation of profit over professional performance. The numerous acts of misconduct convince us that the Respondent has failed to appreciate the duty he, as an attorney, owes to every one of his clients, no matter how routine or small their cases may be.

In fulfilling our duty to set and maintain appropriate standards for the professional conduct of attorneys, we conclude that Respondent's numerous acts of misconduct found herein render him unfit to continue as a member of the Bar of this State.

It is therefore ordered that, by reason of the misconduct found under the Verified Complaint filed in this cause, the Respondent be, and he hereby is, disbarred from the practice of law in this State.

Costs of this proceeding are assessed against the Respondent.

APPENDIX B

Applicable Disciplinary Rules from the Indiana Code of Professional Responsibility

DR 1-102 MISCONDUCT

(A) A lawyer shall not:
- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 2-101 PUBLICITY

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

DR 2-102 PROFESSIONAL NOTICES, LETTERHEADS AND OFFICES

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, except that the following may be used if they are in dignified form;
- (1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law

firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

DR 2-110 WITHDRAWAL FROM EMPLOYMENT

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

DR 3-101 AIDING UNAUTHORIZED PRACTICE OF LAW.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

DR 6-101 FAILING TO ACT COMPETENTLY.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.
(3) Neglect a legal matter entrusted to him.

DR 7-101 REPRESENTING A CLIENT ZEALOUSLY.

(A) A lawyer shall not intentionally:
(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:
(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

APPENDIX C

Order Dated October 25, 1982

IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF	)	
	)	Cause No. 880 S 357
ZARKO SEKEREZ	)	

ORDER

Comes now the Indiana Supreme Court Disciplinary Commission and petitions this Court to require Respondent to supplement the record submitted under Admission and Discipline Rule 23, Section 15, and for an extension of time.

And this Court, being duly advised, now finds that portion of the petition seeking to require the supplementation of the record should not be granted in that the findings of the Hearing Officer are a sufficient basis for the imposition of discipline and that it is incumbent on the petitioning party to present a sufficient record to countermand the significance of the Hearing Officer's findings. If the record submitted is insufficient, the petitioning party must stand on it; if the petitioning party attempts to practice obfuscation, he must accept the consequences.

This Court further finds that the request for an extension of time should be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that the Disciplinary Commission's request for this Court to require Respondent to supplement the record is hereby denied. It is further ordered that the Disciplinary Commission is granted thirty (30) days from this Order to file its Brief.

DONE at Indianapolis, Indiana this 25th day of October, 1982.

/s/ Richard M. Givan
Chief Justice of Indiana

APPENDIX D

Order Dated April 23, 1984

IN THE
SUPREME COURT OF INDIANA

IN THE MATTER OF	)	
	)	Cause No. 880 S 357
ZARKO SEKEREZ	)	

ORDER DENYING POST-JUDGMENT MOTIONS

Comes now respondent and files the following post-judgment motions: "Motion to Stay the Enforcement of the Order Entered Herein on January 18, 1984"; "Petition for Rehearing"; "Amended Motion to Stay the Enforcement of the Order Entered Hereon on January 18, 1984"; "Motion for Leave to Appear *Pro Haec Vice* and to Appear as Additional Counsel"; "Motion for Leave to Supplement Record"; and "Amendment to Motion for Leave to Supplement Record".

And this Court, being duly advised, upon consideration of all pleadings presented under this cause, now finds that the relief prayed for in the noted pleadings should not be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that all motions filed by Respondent subsequent to this Court's Order of Disbarment entered on January 18, 1984, are now hereby denied.

DONE at Indianapolis, this 23 day of April, 1984.

/s/ Richard M. Givan
Chief Justice of Indiana

All Justices Concur.

APPENDIX E

Standard Of Proof For Attorney Disciplinary Hearings

As the following table shows, a majority of the states that have considered the question have held that the standard of proof required is either clear and convincing evidence, or at least a standard greater than a mere preponderance.

Evidence Beyond a Reasonable Doubt

Georgia:

Cushway v. State Bar, 120 Ga. App. 371, 170 S.E.2d 732 (1969), *cert. denied*, 398 U.S. 910 (1970)

Clear and Convincing Evidence

Alabama:

Trammell v. Disc. Bd. of the Ala. State Bar, 431 S.2d 1168 (Ala. 1983)

Arizona:

In re Lurie, 113 Ariz. 95, 546 P.2d 1126 (1976)

Illinois:

In re Bossov, 60 Ill.2d 439, 328 N.E.2d 309, *cert. denied*, 423 U.S. 928 (1975)

Indiana:

In re Moore, 453 N.E.2d 971 (Ind. 1983)

Louisiana:

Louisiana State Bar Association v. Edwins, 329 So.2d 437 (La. 1976)

Maryland:

Bar Association of Baltimore City v. Posner, 275 Md. 250, 339 A.2d 657, *cert. denied*, 423 U.S. 1016 (1975)

Minnesota:
In re Gillard, 271 N.W.2d 785 (Minn. 1978)

Mississippi:
Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981)

New Jersey:
In re Gross, 67 N.J. 419, 341 A.2d 336 (1975)

New Hampshire:
Edes' Case, 118 N.H. 815, 395 A.2d 498 (1978)

New Mexico:
In re Martin, 67 N.M. 276, 354 P.2d 995 (1960)

North Carolina:
In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979)

North Dakota:
Matter of Lovell, 292 N.W.2d 76 (N.D. 1980)

Oregon:
Conduct of Gygi, 273 Or. 443, 541 P.2d 1392 (1975)

Oklahoma:
State Ex rel. Oklahoma Bar Ass'n v. Braswell, 663 P.2d 1228 (Okl. 1983)

Rhode Island:
Carter v. Walsh, 406 A.2d 263, reconsideration denied, 413 A.2d 83 (R.I. 1980)

South Carolina:
In re Friday, 263 S.C. 156, 208 S.E.2d 535 (1974)

The following states have formulated the standard in language roughly equivalent to "clear and convincing" although the language may imply a slightly lower standard.

California:
Davidson v. State Bar, 17 Cal.3d 570, 551 P.2d 1211, 131 Cal.Rptr. 379 (1976) (Convincing proof to a reasonable certainty)

Colorado:

People Ex rel. Dunbar v. Weinstein, 135 Colo. 541, 312 P.2d 1018 (1957) (substantial, clear, convincing, and satisfactory)

Florida:

The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) (mere preponderance is not sufficient)

Idaho:

In re May, 96 Idaho 858, 538 P.2d 787 (1975) (clear showing of bad intent)

Iowa:

Iowa State Bar Association v. Kraschel, 260 Iowa 187, 148 N.W.2d 621 (1967) (convincing preponderance—less than criminal, but more than civil)

Kansas:

State v. Turner, 217 Kan. 574, 538 P.2d 966 (1975) (substantial, clear and convincing)

Montana:

In re Young, 77 Mont. 332, 260 Pac. 957 (1926) (satisfaction to a reasonable certainty)

Nebraska:

State Ex rel. Neb. State Bar Ass'n v. Cook, 194 Neb. 364, 232 N.W.2d 120 (1975) (clear preponderance)

Nevada:

Matter of Kaufman, 93 Nev. 452, 567 P.2d 957 (1977) (higher degree of proof than is ordinary in civil proceedings)

Pennsylvania:

In re Shigon, 462 Pa. 1, 329 A.2d 235 (1974) (clear and satisfactory)

South Dakota:

In re Jaquith, 79 S.D. 677, 117 N.W.2d 97 (1962) (clear, undoubted preponderance)

Utah:

In re McCullough, 97 Utah 533, 95 P.2d 13 (1939) (convincing proof and a fair preponderance)

Vermont:

In re Wright, 131 Vt. 473, 310 A.2d 1 (1973) (clear and free from doubt)

Virginia:

Seventh Dist. Com. of Virginia State Bar v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971) (clear proof but not beyond a reasonable doubt)

Washington:

In re Little, 40 Wash.2d 421, 244 P.2d 255 (1952) (clear preponderance)

West Virginia:

Com. On Legal Ethics of W. Va. v. Daniel, 235 S.E.2d 369 (W.Va. 1977) (full preponderance and clear evidence)

Wisconsin:

State v. Heilprin, 59 Wis.2d 312, 207 N.W.2d 878 (1973) (clear and satisfactory—the middle burden of proof)

Wyoming:

Wyoming Supreme Court Disciplinary Rule 6-h. (substantial, clear, convincing, and satisfactory) (1977)

Fair Preponderance of the Evidence

Alaska:

Matter of Robson, 575 P.2d 771 (Alaska 1978)

Arkansas:

Petition of Shannon, 274 Ark. 106, 621 S.W.2d 853 (1981)

Hawaii:

In re Trask, 46 Haw. 404, 380 P.2d 751 (1963)

Kentucky:

Kentucky Bar Ass'n v. Franklin, 534 S.W.2d 459 (Ky. 1976)

Maine:

Maine Bar Rules. Rule 7(e)(6)(c) [1978]

Massachusetts:

In re Mayberry, 295 Mass. 155, 3 N.E.2d 248 (1936)

Michigan:

Matter of McWhorter, 405 Mich. 563, 284 N.W.2d 472 (1979)

Missouri:

In re Connaghan, 613 S.W.2d 626 (Mo. banc 1981)

New York:

In re Capoccia, 59 N.Y.2d 549, 453 N.E.2d 497, 466 N.Y.S.2d 268 (1983)

Ohio:

Mahoning County Bar Association v. Ruffalio, 176 Ohio St. 263, 199 N.E.2d 396, *cert. denied*, 379 U.S. 931, 85 S.Ct. 328 (1964)

Tennessee:

Tennessee Supreme Court Rule 9, Disciplinary Enforcement Section 1.3 (1981)

Texas:

McInnis v. State, 618 S.W.2d 389 (Tex.Civ.App. 1981)

Connecticut and Delaware do not appear to have conclusively formulated their standards.

APPENDIX F

Individual Counts And Findings Of The Indiana Supreme Court

Factually, the conduct at issue in the several counts is rather involved. The problem was compounded by the fact that a complete transcript of the hearing was not available, either to the hearing officer during the nine-month period between the hearing and the issuance of his report, or to the Indiana Supreme Court during its deliberations (despite the Court's statement in its Disbarment Order that "The proceedings were reported and a complete transcript was available"). See Court Reporter's Affidavit, attached to this Appendix F. However, since petitioner contends that: (1) in regard to the general factual basis of his disbarment the standard of proof was constitutionally insufficient, and (2) the Indiana Supreme Court refused—on the basis of an unpredictably and unfairly applied reading of its procedural rule—to exercise either its acknowledged duty to "determine issues of fact" in general (*Matter of Murray*, 362 N.E.2d 128, 130 (1977)), or to consider the petitioner's particular challenges, it is not necessary to become entangled in a detailed review of the evidence. Nor is it necessary to speculate how the facts might have been decided or the outcome affected by the use of a constitutionally adequate standard of proof and a review of the specifically challenged facts. *Santosky v. Kramer*, 455 U.S. 745, 770 (1981).

A brief summary of the counts and the findings of the Indiana Supreme Court as to each count follows:

Count I arose from petitioner's failure to appear at a hearing on a motion for removal from Indiana filed on behalf of a client. It was only the morning before the removal hearing that a trial scheduled to take precedence over the removal hearing was continued. The client appeared in court for the hearing and obtained the relief

requested. Petitioner's judgment that it was not necessary to ask the client to travel from Tennessee for a hearing that probably would not take place and his absence from court were held to constitute a failure to seek his client's lawful objective, in violation of D.R. 7-101(A)(1)* and to adversely reflect upon his fitness to practice law, in violation of D.R. 1-102(A)(6).

Count II centered around petitioner's withdrawal from representation of a client who had defaulted on an installment agreement petitioner had negotiated with Sears Roebuck & Co. In response to Sears' notices of delinquency, petitioner mailed letters requesting replies to the client at the client's place of employment—where the client had earlier received an alias summons in the same matter as well as a notice of a hearing mailed to him by petitioner. Receiving no reply, petitioner mailed a copy of his withdrawal to the client—again at his place of business. Unbeknownst to petitioner, the client had gone on sick leave and been hospitalized in another city. Sears' attorney, to whom a notice of withdrawal had also been sent, obtained a judgment on the creditor's initial suit. Petitioner was held to have failed, in the course of withdrawing, to take reasonable steps to avoid foreseeable prejudice to the rights of the client, in violation of D.R. 2-110(A)(2) and to have engaged in conduct prejudicial to the administration of justice, in violation of D.R. 1-102(A)(5).

Count III concerned a dissolution of marriage and resulted in three findings of misconduct against petitioner: (1) false and misleading advertisement of a free initial consultation with an attorney, in violation of D.R. 2-101(A); (2) the allowance of a law student to give a client unsupervised legal advice, in violation of D.R. 3-101(A); and (3) the advice to the client that she agree to pay opposing counsel's fees but then return to California, where she lived, without first paying the agreed fee, in violation of D.R. 1-102(A)(4).

---

* The relevant Disciplinary Rules of the Indiana Code of Professional Responsibility for Attorneys at Law appear in Appendix D.

Count IV was dismissed by the Indiana Supreme Court for legal insufficiency.

Count V sprang from services regarding an accident claim and provided the basis for the court's finding that (1) petitioner's advertisement ("No charge for initial consultation") was false and misleading and that the clients were never able to consult with an attorney about their case, in violation of D.R. 2-101(A); (2) petitioner's delegation to his secretary of the client-interviewing function and his refusal to consult with his clients about their cases constituted conduct adversely reflecting on petitioner's fitness to practice law, in violation of D.R. 1-102(A)(5) and (6); (3) petitioner failed to carry out his contract of employment to the prejudice of his client, in violation of D.R. 7-101(A)(2) and (3); and (4) petitioner withdrew from the case and refused to return the client's file, in violation of D.R. 2-110(A)(2).

Count VI found petitioner's use in telephone directory yellow pages and newspaper advertisements of such names for his clinics as "Merrillville Legal Clinic" or "Merrillville Legal Clinic of Zarko Sekerez" to constitute the employment of trade names, in violation of D.R. 2-102(B) and to be false, fraudulent, misleading and deceptive, self-laudatory or unfair, in violation of D.R. 2-101(A). Additionally, pamphlets made available to visitors to several of petitioner's offices were found to constitute a professional notice not authorized by D.R. 2-102 and thus in violation of D.R. 2-102(A).

Count VII was dismissed by the Indiana Supreme Court as being merely duplicative of other Counts.

Exhibit A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE:	)	
	)	No. D-47
ZARKO SEKEREZ, Attorney	)	

AFFIDAVIT

Comes now Emily Trgovich, and states as follows:

1. I was the official court reporter during the August, 1981 proceedings before the Hearing Officer in the disciplinary action against Attorney Zarko Sekerez.

2. I am presently in the process of preparing a full transcript of the evidence presented at said proceedings.

3. I have presently prepared approximately two hundred ninety-four (294) pages of said transcript and have been prevented from completing the remaining pages because of a debilitating illness.

4. I am presently undergoing rehabilitation therapy and am in the process of completing the balance of the transcript with the aid of an assistant.

5. I expect to have the full transcript completed within thirty (30) days.

Dated this 25th day of May, 1984.

/s/ Emily Trgovich
Affiant

STATE OF INDIANA)
)
COUNTY OF LAKE)

The affiant Emily Trgovich, being duly sworn on oath, deposes and says that she has read the foregoing representations and that all statements therein contained are true.

/s/ Emily Trgovich
Affiant

Subscribed and sworn to before me this 25th day of May, 1984.

/s/ Peggy Oram
Resident of Lake County, Indiana

My commission expires:
January 17, 1988.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-121

ZARKO SEKEREZ,

Petitioner,

vs.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT INDIANA SUPREME COURT DISCIPLINARY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-121

ZARKO SEKEREZ,

Petitioner,

vs.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

I.

OPINION BELOW

The decision and opinion giving rise to Petitioner's application for a Writ of Certiorari was made and entered by the Supreme Court of Indiana on January 18, 1984. While said decision and opinion are not yet officially published and reported in the Indiana Reports, the same appears at 458 N.E.2d 229, entitled *In The Matter of Zarko Sekerez.* The decision and opinion is set forth in Petitioner's Appendix at App 1-27. The effect of the subject decision

and opinion was to disbar Petitioner from the practice of law in the State of Indiana.

II.
JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

III.
QUESTIONS PRESENTED

The Respondent will respond below in its Argument to both of the questions presented in the petition.

IV.
CONSTITUTIONAL PROVISION AND STATE RULE INVOLVED

The Petitioner has fairly summarized the constitutional provision and state rule he claims have application to the questions presented.

V.
STATEMENT OF THE CASE

On August 29, 1980, a seven-count Verified Complaint For Disciplinary Action was filed against the Petitioner by Respondent. A Hearing Officer was appointed by the Supreme Court of Indiana and the cause was heard at a week-long evidentiary hearing commencing on August 24, 1981. The Hearing Officer filed his report to the Supreme Court of Indiana on May 17, 1982, pursuant to Admission and Discipline Rule 23, Section 14(f). In said report, the Hearing Officer found that Petitioner had committed the acts of misconduct alleged in each of the seven counts of the Verified Complaint.

A review by the Supreme Court of Indiana of the findings and conclusions contained in the Hearing Officer's Report

is provided for in Admission and Discipline Rule 23, Section 15(a). Petitioner petitioned for a review of certain factual findings of the Hearing Officer on July 19, 1982. However, Petitioner did not comply with the mandate of Admission and Discipline Rule 23, Section 15(c) in that he failed to provide a record of all evidence before the Hearing Officer as to the contested findings. Absent a sufficient record to support Petitioner's challenges to certain factual findings made by the Hearing Officer, the Supreme Court of Indiana accepted the Hearing Officer's Findings of Fact and limited its review in the matter to the conclusions reached by the Hearing Officer and to Petitioner's constitutional challenges to certain disciplinary rules that Petitioner was found to have violated.

The result of the Court's review was that two (2) of the seven counts were dismissed. As to the remaining five (5) counts, the Court found that the Petitioner had violated the **Code of Professional Responsibility for Attorneys at Law** to such extent as to warrant disbarment. Disbarment was ordered in the Court's opinion entered on January 18, 1984.

On February 27, 1984, Petitioner filed the following post-judgment motions: "Motion To Stay The Enforcement Of The Order Entered Herein On January 18, 1984"; "Petition For Rehearing"; "Amended Motion To Stay The Enforcement Of The Order Entered Hereon On January 18, 1984"; "Motion For Leave To Appear *Pro Haec Vice* And To Appear As Additional Counsel"; "Motion For Leave To Supplement Record"; and "Amendment To Motion For Leave To Supplement Record". All motions were denied by the Indiana Supreme Court on April 23, 1984.

VI.
REASONS FOR DENYING THE WRIT

I. Petitioner's First Question For Review Does Not Present A Justiciable Issue To Invoke This Court's Writ of Certiorari

Petitioner seeks to have this Court issue its extraordinary Writ of Certiorari to decide the question of what standard of proof is constitutionally required in attorney discipline matters. Petitioner then argues, in pages 29 through 46 of his Petition, for the very standard that the Indiana Supreme Court had previously adopted, and in fact applied in Petitioner's case below. We quote from the record below as it appears in Petitioner's Appendix at App 6 and 7:

> As a final preliminary matter, we note that the Respondent also urges, in a single sentence, that Admission and Discipline Rule 23, Section 14(f), which provides for the "preponderance of evidence" standard of proof for disciplinary cases, is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. The Respondent makes no attempt to substantiate this contention. However, in the recent case of *In re Moore*, (1983) Ind., 453 N.E.2d 971, this Court re-examined the standard of proof applicable to these cases and determined that the "clear and convincing" standard of proof more reasonably conforms to our analysis of the nature of the disciplinary process and follows the weight of authority. Accordingly, we will review the evidence in this case under a "clear and convincing" standard.

Therefore, it is respectfully submitted that Petitioner has failed to present a question that requires this Court's review based upon the facts of this case.

II. The Indiana Supreme Court's Application And Interpretation Of Admission And Discipline Rule 23, Section 15(c), Did Not Violate Petitioner's Due Process Rights

Petitioner seeks to draw into issue the Supreme Court of Indiana's Admission and Discipline Rule 23, Section 15(c), which reads in pertinent part as follows:

> (c) In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue. Within thirty (30) days of the filing of the transcript, opposing parties may file such additional transcript as deemed necessary to resolve the factual issue so raised in the petition for review.

Petitioner's argument is two-fold: First, that the rule is fatally vague; second, that the court interpreted the rule in a way which invited the conduct of Petitioner which the court later held to be insufficient. Neither proposition is well taken.

The rule is clear and unambiguous in its mandate that the party contesting a factual finding made by the hearing officer shall file with the petition for review a "...record of all evidence before the hearing officer relating to this factual issue". In his response to the clear mandate of the rule, the Petitioner filed only a partial record consisting of the testimony of his witnesses.

Petitioner contends that the second sentence of the above quoted rule led to his confusion as to the requirement contained in the first sentence. Petitioner's position is that because the second sentence of the rule provides that opposing parties may file such additional transcript as is deemed necessary to resolve the issue, the Petitioner "...is to supply what he believes to be all the necessary evidence..." (Petitioner's Argument, p. 22 in the Petition). Petitioner's

interpretation of the rule has no support in logic. The possibility that the opposing party may deem that additional transcript is necessary to resolve the issue in question does not negate the petitioning party's obligation under the rule. The first sentence states what the petitioning party **"shall"** do; the second sentence states what the opposing party **"may"** do. Therefore, Petitioner's contention that the language of the rule is fatally vague is not founded in fact or supported by logic.

The second argument Petitioner makes regarding Admission and Discipline Rule 23, Section 15(c) is that the Supreme Court of Indiana interpreted the rule in such a way as to invite Petitioner's conduct in supplying only a partial record in his petition for review, and subsequently foreclosed Petitioner's opportunity for a review of the findings. Petitioner seeks to draw support for this position from an order issued by the Supreme Court of Indiana on October 25, 1982, whereby the court denied the Disciplinary Commission's request that the court compel Petitioner to file a record of all the evidence before the hearing officer relating to the contested issues. The court denied the Commission's request in the subject order. The order appears in Petitioner's Appendix C at App. 34.

The above argument fails for two reasons. First, the order that Petitioner claims misled him was issued **after** the Petitioner had filed his petition for review of the Hearing Officer's findings. The Petitioner filed for review on July 19, 1982, and the court issued the subject order on October 25, 1982. Therefore, Petitioner's contention that he relied on the court's order is untenable.

Second, notwithstanding the above analysis, a reference to the last sentence of the second paragraph of the subject order will reveal that the Petitioner was on notice that the record submitted with his petition for review was not sufficient. The referenced sentence reads as follows:

> If the record submitted is insufficient, the petitioning

> party must stand on it; if the petitioning party attempts to practice obfuscation, he must accept the consequences.

Petitioner failed to heed the court's warning, ignored its admonition, and did not seek to supplement the record until February 27, 1984.

The Supreme Court of Indiana's recognition of the fact that the Petitioner had failed to follow the mandate of a rule that provides a party with the opportunity for a review of contested findings cannot be accurately characterized as "...a rather harsh procedural sleight-of-hand..." (pg. 46 of the Petition).

Notwithstanding the rule's clear directive that the party wishing to contest a factual finding of a hearing officer must file a record of all the evidence before the hearing officer relating to that issue, and, notwithstanding the language of the court in its order of October 25, 1982, whereby the court characterized Petitioner's efforts as an "attempt to practice obfuscation", the Petitioner did not seek to supplement the record until February 27, 1984, more than five (5) weeks after the court had issued its final order disbarring Petitioner.

Therefore, it is respectfully submitted that the Supreme Court of Indiana's application and interpretation of Admission and Discipline Rule 23, Section 15(c) comports with the Due Process requirements of the Fourteenth Amendment to the Constitution.

CONCLUSION

The decision below is correct. For the foregoing reasons, it is respectfully submitted that this Petition For Writ of Certiorari should be denied.

Respectfully submitted,

/S/ SHELDON A. BRESKOW
SHELDON A. BRESKOW

/S/ DAVID B. HUGHES
DAVID B. HUGHES

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84-121

No. 84-821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

On Petition For Writ Of Certiorari
To The Supreme Court Of Indiana

BRIEF IN REPLY TO BRIEF OF RESPONDENT INDIANA SUPREME COURT DISCIPLINARY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-821

IN RE

ZARKO SEKEREZ,

Attorney-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF IN REPLY TO BRIEF OF RESPONDENT INDIANA SUPREME COURT DISCIPLINARY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In response to Petitioner's argument that "preponderance of the evidence" is not a constitutionally sufficient standard upon which to base factual findings supporting disbarment of an attorney, Respondent merely quotes that part of the Indiana Supreme Court's

Disbarment Order in which the court stated its intention to review the evidence under a "clear and convincing" standard. Respondent neglects to mention that the court then proceeded to "adopt and accept as its own the findings of fact submitted by the hearing officer" - findings measured by the preponderance of the evidence. (Petition, pp. 9, 12-13, 17-19.) The court's statement of its intent to apply a standard more demanding than a mere preponderance does not erase the fact that it never did so and Respondent's claim that the Indiana Supreme Court "in fact applied [the clear and convincing measure] in Petitioner's case below" (Respondent's Brief, p. 4) is fatally inaccurate.

Respondent's protests about the clarity of Rule 23, Sec. 15(c) overlook

the fact that, plainly, the Indiana Supreme Court did not find it so unambiguous. "Sufficient" is not synonomous with "all" in anyone's lexicon and the court's use of the word "sufficient" in its October 25, 1982 Order not only demonstrates the vagueness of the Rule but, coming as it did from the highest Indiana court, also perpetuated the problem. Respondent's statement (Brief, p. 5) that "Petitioner filed only a partial record consisting of the testimony of his witnesses" is simply inaccurate. (See, Petition, pp. 15-18.)

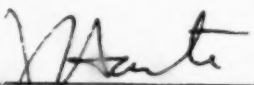
Respondent's argument that the Indiana Supreme Court's October 25, 1982 interpretation of the Rule is irrelevant because it came <u>after</u> Petitioner filed his petition for review is fallacious for two reasons. First, as reviewed above,

the court's Order itself demonstrated the Rule's vagueness - to separate the Order from the Rule on the basis of timing avoids the real issue. Second, taking Respondent's argument literally would mean that no matter what, an attorney challenging a hearing officer's disbarment findings and recommendation would be strictly limited to the material he submitted with his original petition. Such a procedural straight-jacket is neither indicated by the Rule nor consistent with the gravity of the issue. Petitioner did in fact submit additional evidence with his Reply Brief (see, Petition, pp. 16-17, 24) in an attempt to honor the Rule and the court's interpretation of it. At the time, there is no suggestion that anyone had the temerity to suggest that this additional

material could not be considered.

The flaws in Respondent's argument for the denial of Certiorari only serve to illustrate the injustices of proceedings by which the State of Indiana deprived petitioner of his law license. Petitioner respectfully submits that these injustices deserve review.

Respectully submitted,



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